BEVERIDGE & DIAMOND PC

June 26, 2008

MEMORANDUM

TO: Michael Massey, Esq.
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U.S. Environmental Protection Agency, Region IX

FROM: Beveridge & Diamond, PC

RE: Potential CERCLA Liability for Owners of Sewer Systems

This memorandum analyzes the potential CERCLA liability of the San Francisco Public Utilities Commission ("SFPUC"), which owns and operates the sewer system in the Yosemite Creek drainage basin (the "Yosemite Creek Basin"). As discussed more fully below, such public entity owners and operators of sewer systems have been held to be potentially responsible parties ("PRPs") under CERCLA. Typically, courts making these determinations also examine whether CERCLA's third party defense is applicable. At Yosemite Creek, SFPUC should be considered to be a PRP under CERCLA as an "owner" and also could be an "operator" or an "arranger." It also appears that SFPUC would not meet its burden to prove the elements of the third party defense since SFPUC's sewer system was designed to discharge to Yosemite Creek under certain situations, city ordinances allowed discharges of hazardous substances -- including heavy metals that are chemicals of concern at Yosemite Creek, and it appears that SFPUC knew about discharges of hazardous substances to its sewers and apparently took little action to abate them.

I. BACKGROUND

The Yosemite Creek Basin encompasses approximately 1469 acres of the southeast portion of San Francisco. *See Sediment Investigation at Yosemite Creek,* Battelle, (May 5, 2004) ("Battelle (2004)") at 1-3. Prior to the turn of the last century, areas surrounding Yosemite Creek were mainly marshland, wetland or submerged below mean tide level. *Id*. Most of this area was land-filled between 1940 and 1970, and by 1950, areas surrounding the creek were heavily utilized for residences, commercial businesses, and small industry. *Id*. The U.S. Navy began ship repair operations at Hunters Point in 1941 and the Navy port was an active center of secondary manufacturing for the shipyard from the 1940's through 1974. For the past 20 years, industrial activities have primarily characterized the area surrounding Yosemite Creek. *Id*.

A. The Sewer Configuration in the Yosemite Creek Basin.

The sewer system in the Yosemite Creek Basin is owned and maintained by the SFPUC. This area is served by a combined sewer system that collects both sanitary and industrial sewage and stormwater in the same pipes. *See* Letter from Tommy T. Moala, Assistant General Manager, Wastewater Enterprise, SFPUC to Chris Reiner, EPA of April 11, 2008 ("PUC Letter").

The sewers in the basin were first built in 1909. *Id.* Until 1958, combined sewer and stormwater flows in the basin discharged into three combined sewage outfalls ("CSOs"): CSO 40, located near Griffith Street near the middle of the creek on the north side; CSO 41, located at the end of Yosemite Avenue, at the head of Yosemite Creek; and CSO 42 located near Fitch Street, close to the creek mouth on the southern shore. *See* Battelle (2004) at 1-9. In 1957, the Yosemite pump station began operation and all dry-weather flows were thereafter transported and treated at the Southeast Wastewater Pollution Control Plant. *See* PUC Letter; *see also* Battelle (2004) at 1-9.[1] In periods of wet weather, the combined sewage was discharged directly from the three CSOs. *See* Battelle (2004) at 1-9. In 1990, a transport/storage box designed to contain wet weather flows from Yosemite Basin went into operation and CSO 41 was replaced by an overflow weir located near the creek end. *See* Battelle (2004) at 1-9. According to EPA, this has reduced the number of storm-event sewage discharges to Yosemite Creek from approximately 46 per year to one per year. *See* Action Memorandum, Request for a Time-Critical Removal Action at the Yosemite Creek Site, in San Francisco County, California (undated) at 3.

II. ANALYSIS

A. SFPUC May Qualify as a CERCLA PRP as Both an "Owner or Operator" and as an "Arranger."

Courts from both California and other jurisdictions have examined the issue of whether owners and operators of sewer systems -- including public entities -- may qualify as PRPs under CERCLA. These courts have found that these entities may qualify as CERCLA PRPs as both "owners or operators" and as "arrangers." CERCLA defines these classes of PRP as follows:

- "Owners or Operators" are defined as "any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of," CERCLA § 107(a)(2), 42 U.S.C. § 9607(a)(2); and
- "Arrangers" are defined as "any person who . . . arranged for disposal . . . of hazardous substances owned or possessed . . . by any other party or entity, at any facility . . . owned or operated by another party or entity and containing such hazardous substances." CERCLA § 107(a)(3), 42 U.S.C. § 9607(a)(3).

1. Sewers and CSOs Fall Within CERCLA's Definition of "Facility."

For an owner of a sewer system to be considered a PRP under CERCLA's definitions of "owners or operators" or "arrangers" the sewer system itself must first fall under CERCLA's definition of "facility."

A "facility" is defined under CERCLA as:

> The term "facility" means (A) any building, structure, installation, equipment, pipe or pipeline (including any pipe into a sewer or publicly owned treatment works), well, pit, pond, lagoon, impoundment, ditch, landfill, storage container, motor vehicle,

[1] According to Battelle (2004), the Yosemite pump station began operation in 1959.

> rolling stock, or aircraft, or (B) any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located; but does not include any consumer product in consumer use or any vessel.

42 U.S.C. § 9601(9) (emphasis added). This definition has been interpreted to include sewers lines and POTWs themselves. *See Westfarm Associates Limited Partnership v. Washington Suburban Sanitary Commission*, 66 F.3d 669 (4th Cir. 1995).

In *Westfarm*, the Fourth Circuit recognized that in order to recover the costs of cleanup under CERCLA, a plaintiff must show that a defendant "owned or operated" a "facility" from which there was a "release" of a hazardous substance. *See Westfarm*, 66 F.3d at 677. The defendant in *Westfarm*, a municipal sewer operator, argued that it did not fall within CERCLA's definition of "owner or operator" since the language demonstrated a Congressional intent to exclude POTWs from the definition of "facility."[2] The court, reading CERCLA as a whole, found that Congress did not intend to exclude POTWs from liability. The court recognized that Congress expressly abrogated state sovereign immunity under CERCLA "thereby subjecting 'facilities' owned and operated by state governments to liability." *Westfarm*, 66 F.3d at 678. The court recognized that while a narrow exception to this definition of "owner or operator" excluded government entities from liability when they acquired ownership of a facility involuntarily, *id*. (citing 42 U.S.C. § 9601 (20(D)), if "Congress intended to exclude state and local governments from liability in other situations -- such as when they, through their POTWs, are otherwise liable under CERCLA -- Congress would have either: (a) excluded all state and local governments from the definition of 'owner or operator,' rather than limited the exclusion to the involuntary acquisition situation; or (b) included POTWs in the list of entities excluded from the definition of 'owner or operator.'" *Id*.[3]

CSOs owned by public entities also have been found to be "facilities" within the meaning of CERCLA. *See United States v. Union Corp*., 277 F.Supp.2d 478, 486 (E.D. Penn. 2003). In *Union*, third-party plaintiffs sought contribution from the city of Philadelphia towards response costs pursuant to CERCLA. *Id*. at 483. The city utilized a combined sewer system in the neighborhood of the contaminated site similar to that of the Yosemite Creek Basin. Specifically, the system used interceptors to transfer all wastewater to treatment plants. *Id*. However, during heavy storms, the total volume of water could become too large for the interceptors to handle and overflows would be discharged into bodies of water like the Delaware River. *Id*. The CSO at issue in *Union* emptied into an embayment adjacent to the contaminated site during heavy rains. *Id*. Thus, third-party plaintiff asserted that the city discharged waste containing hazardous

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[2] The court recognized that "[a] sewer system is a publicly owned treatment works." *Id*. at 678 n. 5.

[3] The court also found that the language "including any pipe into a sewer or publicly owned treatment works" appeared to "emphasize the point that pipes leading into sewers or POTWs are the responsibility of the owner or operator of the pipes, not the sewer or POTW." *Id*. at 678-79.

materials into site from the CSO. *Id*. The defendant denied liability, contending that the City of Philadelphia's CSO was not a "facility." *Id*. at 486. Recognizing that CERCLA defines "facility" broadly, the court adopted *Westfarm's* "reasoning and conclusion that Congress did not intend to exclude municipal sewer systems from CERCLA's definition of 'facilities'" and held that "[t]he City's CSO is a 'facility' within the meaning of CERCLA." *Id*. at 486-487.

Based on *Westfarm* and *Union*, SFPUC's CSOs that discharge into Yosemite Creek clearly fall within CERCLA's definition of "facility."

2. **Owners of Sewers & CSO Facilities -- Including Public Entities -- May Qualify as PRPs**

As discussed above, in *Westfarm*, the Fourth Circuit held that an owner or operator of a sewer -- including a public entity -- could qualify as a PRP as the "owner or operator" of a "facility" from which hazardous substances have been released. *See Westfarm,* 66 F.3d 669. California district courts also have found owners of sewers to be potential owner or operator PRPs. For example, in *Lincoln Properties, LTD v. Higgins*, 823 F.Supp. 1528, 1539-44 (E.D. Cal. 1992), plaintiff owned a shopping center and sought recovery of response costs and contribution from tenant dry cleaners and a county. It asserted that the county was liable due to its alleged ownership of a portion of the leaking sewers under plaintiff's property and its undisputed ownership of various wells with cracked casings through which PCE may have contaminated groundwater. *Id*. Plaintiff contended that as an owner and operator of sewers and wells, the county was liable for releases of PCE from these "facilities."[4] *Id*. at 1533.

The *Lincoln Properties* court recognized that the county was an "owner" within the meaning of CERCLA, stating "[m]ere ownership of the property on which the release took place is sufficient to impose liability under §107(a), regardless of any control or lack of control over the disposal activities." *Id*. at 1533 (*quoting U.S. v. A & N Cleaners and Launderers, Inc.*, 788 F. Supp. 1317, 1332 (S.D. N.Y. 1992). However, the court found that operator liability "'only attaches if the defendant had authority to control the cause of the contamination at the time the hazardous substances were released into the environment.'" *Id*. at 1534 (citations omitted). Despite the fact that the County performed maintenance and repairs on the sewers, the court found that there was no evidence that the County participated in the operation of the sewer lines or "had authority to control PCE in these [sewer] segments." *Id*.

Courts in other jurisdictions have also found owners of sewers to be PRPs under CERCLA. In *Union*, discussed above, where it was undisputed that defendant was the current owner and operator of a CSO, the court concluded that the city would be a PRP under CERCLA if its CSO "released contaminants into the mudflat" that was a part of the contaminated site at issue. *See Union*, 277 F.Supp.2d at 488. The court noted that "'[m]unicipalities are explicitly included as PRPs [potentially responsible persons] for purposes of the liability provisions of 42 U.S.C. § 9607(a).'" *Id*. (*quoting N.J., Dept. of Environmental Protection v. Gloucester Envtl. Mgmt*, 821 F.Supp. 999, 1004 (D.N.J. 1993).

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[4] The parties did not dispute that the sewer system and wells were "facilities." *See id*. at 1533 n.2.

In *Bangor v. Citizens Communications Company*, 2004 U.S. Dist. LEXIS 3845 (D. Me. 2004), the court found that a city qualified as a PRP because it owned the inter-tidal zone of the contaminated river site at issue. The court also found that the City was both an "operator" and an "arranger." Specifically, the court found that the city had exercised its powers of eminent domain to facilitate the construction of an enclosed sewer drain that was installed specifically for the purpose of carrying away the waste of a company that owned and operated a gas plant. *See id*. at *48. The court stated "[n]ot only did the City thereby facilitate the alleged 100-plus years of hazardous waste disposal . . . but it also designated the [contaminated site] as the appropriate disposal facility." *Id*. *48-49. The court further stated:

> As a consequence, the City would be potentially liable for the [contamination] in a suit commenced by the United States or an innocent party who performed a clean up because the City exercised control over the sewer installation, an "operation" specifically related to pollution and an "arrangement for disposal or . . . for transport for disposal" of hazardous substances from the generating facility directly to the River facility. (*Citing* 42 U.S.C. § 9607(a)(3)) This is more than standing by and failing to prevent contamination, as described in *Carson Harbor*. This is contribution toward contamination on par with that present in *Westfarm* and implicates CERCLA's strict liability regime.

Id. at *49.

3. **At Yosemite Creek, SFPUC Qualifies as a PRP as an "Owner" and May Also Qualify as an "Operator" or "Arranger."**

At Yosemite Creek, SFPUC should bear CERCLA status liability as an "owner," for it owns the sewer lines at issue. Thus, if a "release" from these sewer lines was shown, the SFPUC's "mere ownership" of these sewer lines would be sufficient to impose CERCLA liability as an owner "regardless of any control or lack of control over the disposal activities." *See Lincoln Properties*, 823 F.Supp. at 1533.

SFPUC also likely qualifies as an "operator" or "arranger" PRP. In the Yosemite Creek Basin, SFPUC designed, installed, and for nearly 100 years maintained a sewer system that collects both sanitary and industrial sewage and stormwater in the same pipes. By the time SFPUC reconfigured the sewer system in 1957, the area around Yosemite Creek was heavily utilized by industry and the Navy had been operating at Hunters Point for more than 15 years. SFPUC nonetheless installed a new sewer system that directed untreated overflows of industrial sewage into Yosemite Creek during wet weather flows. It clearly was foreseeable that this design would result in industrial wastes being deposited at the Site.

Currently available information regarding SFPUC's historical knowledge regarding discharges of hazardous substances into its sewers, including records of the San Francisco Department of Public Works ("SFDPW"), show that as early as the 1960's and 1970's, it was actively inspecting industrial facilities in the area of Yosemite Creek and knew that heavy metals, including lead, mercury, and zinc were being discharged into its sewers from industrial facilities in the Yosemite Creek Basin such as Bay Area Drum. *See, e.g.,* Waste Discharge

Report Worksheet, December 27, 1972; Industrial Waste Sampling Results, June 3, 1980. It is unclear what the response of SFDPW and SFPUC was to these sampling results, but the discharges appear to have continued. It wasn't until 1990 that SFPUC constructed the overflow weir at the head of Yosemite Creek that greatly reduced the annual number of wet weather raw sewage discharges from this heavily industrialized area directly into Yosemite Creek. Here, as was the case with the City of Philadelphia in *Union*, *supra*, the City & County of San Francisco had knowledge of releases, operated the sewer lines at issue, and had "authority to control the cause of the contamination at the time the hazardous substances were released into the environment." *Lincoln Properties*, 823 F.Supp. at 1534. Thus, SFPUC appears to bear CERCLA liability as both an operator PRP and an arranger PRP in addition to its status as an owner of a facility.

B. **SFPUC Likely Cannot Meet the Requirements of CERCLA's Third Party Defense.**

In cases where owners of sewers are alleged to be potential PRPs, courts typically examine whether CERCLA's third party defense, also known as the "innocent landowner" defense, is applicable. For the third party defense to be applicable, a defendant must establish all of the following elements by a preponderance of the evidence:

1) that a third party was the sole cause of the release of hazardous substance;
2) that the third party was not the defendant's employee or agent;
3) that the act or omission of the third party causing the release did not occur in connection with a contractual relationship, existing either directly or indirectly, with the defendant;
4) that the defendant exercised due care with respect to the hazardous substance concerned; and
5) that the defendant took precautions against foreseeable acts or omissions of the third party.

See Lincoln Properties, 823 F.Supp. at 1539-1540; *see also* 42 U.S.C. § 9607(b)(3).

In *Westfarm*, the Fourth Circuit found that defendant failed to produce sufficient evidence to satisfy the elements of this defense. *Westfarm*, 66 F.3d at 682. Specifically, the court found that defendant failed to meet its burden with regard to the "due care" element of the defense, finding that it knew from inspecting the dry cleaning facility that the facility had used PCE and knew that it poured hazardous substances into the sewer. *Id.* Moreover, defendant's regulations permitted discharges of toxic organics and other hazardous substances and it was aware of cracks in its sewer and did not take precautions against the foreseeable result that hazardous substances such as PCE would be discharged into the sewer. The Court concluded, "[defendant] had the power to abate the foreseeable release of PCE, yet failed to exercise that power. In light of such failure, we cannot find that any genuine dispute was created that [defendant] exercised due care or took precautions against the foreseeable acts of third parties such as would have entitled it to the 'innocent landowner' defense." *Id.* at 683.

Two California district courts also have examined this issue and found that, while a sewer owner may qualify as a PRP as an owner or operator, CERCLA's third party defenses may also

be applicable. As noted above, in *Lincoln Properties* the court found that defendant, a county, owned portions of a sewer line and wells, and thus was an "owner" under CERCLA. *See Lincoln Properties*, 823 F.Supp. at 1538. However, the court also found that the county had a viable third party defense.

The court found that defendant took reasonable precautions to prevent releases of hazardous substances, and that since the county had an ordinance prohibiting the discharge of cleaning solvents, the releases were not foreseeable. *Id*. at 1542-43. The court also found that the county exercised due care and took reasonable precautions with respect to its sewer system since the sewer lines were built and maintained in accordance with industry standards, a county ordinance prohibited the discharge of solvents into the sewer, and none of the dry cleaners ever applied for permission to discharge hazardous substances. *Id*. at 1544. The court concluded that the county "established by uncontroverted evidence all elements of the third party defense. Thus, pursuant to 42 U.S.C. § 9607(b)(3), the county is not subject to liability on the CERCLA claims against it." *Id*.

Similarly, in *Carson Harbor Village, Ltd v. Unocal Corp*., 287 F.Supp.2d 1118, 1194 (C.D. Cal. 2003), the court declined to find municipal defendants liable as operators under CERCLA merely on evidence that they "regulated and maintained [a] storm drain system leading to the [contaminated] property" in the absence of evidence that they did "anything more than 'stand by and fail to prevent the contamination.'" The court also recognized that "[t]he municipalities made efforts to prevent contamination of the water in the storm drains, and [plaintiff] has adduced no evidence that they had any authority to control the disposal of the alleged contamination into the system." *Id*.

At Yosemite Creek, SFPUC would bear the burden to prove all of the elements of CERCLA's third party defense by a preponderance of the evidence. If SFPUC asserted this defense, the application likely would turn on the final two elements of the five-part test -- whether SFPUC exercised due care and whether SFPUC took precautions against foreseeable acts or omissions of third parties. The situation at Yosemite Creek appears to be more similar to that described in *Westfarm* than those described in *Lincoln Properties* or *Carson Harbor*. Like the defendant in *Westfarm*, SFDPW knew from inspecting at least one industrial facility, and very likely others, that heavy metals including lead, zinc and mercury were being discharged into the sewers. *See, e.g.,* Waste Discharge Report Worksheet, December 27, 1972; Industrial Waste Sampling Results, June 3, 1980. SFDPW regulations also permitted discharges of these metals up to certain limits (*see, e.g.,* Waste Discharge Report Worksheet, dated December 27, 1972). Most importantly, SFPUC designed this combined residential and industrial sewer system such that during wet weather flows raw sewage would discharge directly into Yosemite Creek. Although SFPUC had the power to abate the foreseeable release of hazardous substances, it failed to exercise that power, and thus, SFPUC failed to meet the due care element of CERCLA's third party defense.

The situation at Yosemite Creek can arguably be distinguished from that in *Lincoln Properties*. In *Lincoln Properties*, the defendant county had an ordinance prohibiting the discharge of the cleaning solvents that contaminated the site at issue. At Yosemite Creek, SFDPW did not prohibit the discharge of heavy metals, and it is unclear what its policies

regarding PCBs and pesticides were. Instead, SFDPW allowed discharges of heavy metals up to certain limits, and thus, it was foreseeable that these contaminants would reach Yosemite Creek.

III. CONCLUSION

SFPUC, as the owner and operator of sewer lines that discharged hazardous substances to Yosemite Creek, should be considered a CERCLA PRP as an "owner" since "mere ownership" of the sewer lines is sufficient to impose CERCLA liability as an owner "regardless of any control or lack of control over the disposal activities." *See Lincoln Properties*, 823 F.Supp. at 1533. While SFPUC's CERCLA liability as an "operator" or "arranger" is a closer question, it also could be considered such a PRP since it designed and built the sewer system that appears to have released hazardous substances to Yosemite Creek, knew that heavy metals were being discharged to its sewers, and apparently did little or nothing to stop these discharges.

SFPUC bears the burden to prove all of the elements of CERCLA's third party defense by a preponderance of the evidence. If SFPUC asserted this defense, it likely would have difficulty proving that it exercised due care and took precautions against foreseeable acts or omissions of third parties. SFPUC likely knew that several of the industrial businesses in the Yosemite Creek Basin were discharging contaminants, including heavy metals, into its sewers and it designed its sewer system to release this sewage into the creek in certain situations. Moreover, under the SFDPW's policies, businesses were allowed to discharge certain levels of these contaminants into its sewers.